United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-1047

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To be argued by
ROBERT M. ZISKIN

Pgs 5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED OPTICAL WORKERS UNION, LOCAL 408, affiliated with the INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

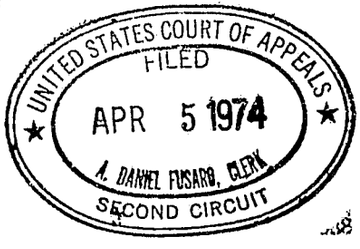
Plaintiff-Appellee,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant-Appellant.

On Appeal from the United States District Court For the Eastern District of New York



BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED OPTICAL WORKERS UNION, LOCAL 408, affiliated with the INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL-CIO,

Plaintiff-Appellee,

-against-

STERLING OPTICAL COMPANY, INC.,

Defendant-Appellant.

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PRELIMINARY STATEMENT

Sterling Optical Company, Inc., defendant-appellant, appeals from the Final Judgment (JA88a-89a)* of the Honorable Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York entered December 10, 1973. Said Final Judgment ordered arbitration of the dispute involving the subcontracting out and termination of certain bargaining unit work but, nevertheless, held that Article XXVIII (relating to subcontracting) of the

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* References to the Joint Appendix filed with the Court are cited "JA", followed by the page number at which the cited material appears.

collective bargaining agreement was "null and void and of no effect" under Section 8(e) of the National Labor Relations Act, as amended, 29 U.S.C. §158(e).

STATEMENT OF THE ISSUES PRESENTED

1. WHETHER THE COURT BELOW EXCEEDED ITS JURISDICTION AND INFRINGED ON AN AREA EXCLUSIVELY RESERVED TO THE ARBITRATOR IN STRIKING ARTICLE XXVIII FROM THE COLLECTIVE BARGAINING AGREEMENT?

2. WHETHER THE COURT BELOW WAS CORRECT IN EXCISING ARTICLE XXVIII IN ITS ENTIRETY?

PROCEEDINGS IN COURT BELOW

Plaintiff-Appellee, United Optical Workers Union, Local 408, affiliated with the International Union of Electrical, Radio & Machine Workers, AFL-CIO (hereinafter referred to as the "Union") commenced this action against Sterling Optical Company, Inc. (hereinafter referred to as the "Company") seeking a declaratory judgment and an order compelling arbitration of certain disputes arising out of the Company's unilateral decision to subcontract out certain bargaining unit work performed at its Brooklyn, New York plant, and for injunctive relief pending arbitration. Concurrently, the Union applied for a temporary restraining order and a preliminary injunction to enjoin the Company from implementing its unilateral decision to subcontract out bargaining unit work in violation of the parties' collective bargaining agreement. Having heard oral argument, Judge Mishler, on September 28, 1973, denied the Union's application for a temporary restraining order, holding that (1) Article XXVIII of the parties' collective bargaining agreement violated Section 8(e) of the Act, and (2) on equitable grounds.

Thereafter, the Company filed its answer, with counterclaim, seeking a declaratory judgment that Article XXVIII of the collective bargaining agreement is unenforceable

and void insofar as said provision limits its right to subcontract bargaining unit work (JA39a-42a). At this time the Company also moved for partial summary judgment (JA43a-70a). The Union filed its reply to the Company's motion for partial summary judgment (JA71a-72a) and moved for summary judgment (JA77a-87a).

There being no dispute as to the material facts, the parties, submitted a Stipulation of Facts (JA73a-76a) to the Court.

On December 10, 1973, Judge Mishler filed a Memorandum of Decision (JA90a-96a) denying the Union's application for injunctive relief, decreeing that Article XXVIII is null and void, and directing arbitration on all matters raised by the Union in its demand for arbitration.

On January 11, 1974, Judge Mishler, upon a motion brought by the Company, pursuant to Rule 62 of the Federal Rules of Civil Procedure, stayed arbitration pending appeal (JA98a).

STATEMENT OF THE FACTS

Since in or about 1953, the Union and the Company have been parties to a series of collective bargaining agreements, the most recent of which was entered into on April 30, 1973 and continues in effect until April 30, 1976 (JA4a, 8a-23a, 53a-69a).

In addition to setting forth the terms and conditions of employment of bargaining unit employees, Article VIII of the collective bargaining agreement contains a broad provision for the submission of any and all unresolved grievances and disputes to final and binding arbitration. In relevant part, Article VIII (JA12a, 74a) provides:

> "Any and all grievances or disputes between the Employer and his employees which cannot be satisfactorily adjusted by a representative of the Employer and a duly authorized representative of the Union shall be referred to an Arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both parties to this Agreement, even though one of the Parties shall fail to appear; and such award shall be enforceable in any Court of competent jurisdiction. Costs of arbitration shall be borne equally by the Parties.
>
> (a) Any grievances or disputes arising under the Contract which are not resolved within ten (10) days from

> the date either Party is informed by registered mail, shall be submitted immediately to arbitration by the requesting Party as hereinabove provided."

On or about September 17, 1973, the Company, without prior notice to or consultation with the Union, advised the Union that effective September 28, 1973, it would subcontract out certain laboratory work then being performed by bargaining unit employees at its Brooklyn laboratory located at 160 Jay Street, Brooklyn, New York, discontinue the laboratory operations and terminate the employment of the 36 bargaining unit employees performing such work (JA5a, 50a, 74a).

Thereupon, on September 19, 1973, Union Business Manager Sebastian J. Rebaldo telegraphed the Company that its proposed action was in violation of the parties' collective bargaining agreement and requested a meeting (JA35a, 70a, 50a, 74a).

On September 21, 1973, Union and Company representatives met and discussed the Company's decision to subcontract out laboratory work, its decision to discontinue the Brooklyn laboratory operation and its decision to terminate the bargaining unit employees then performing said

work, but were unable to resolve the disputes (JA5a, 75a, 86a).

Inasmuch as no agreement was reached, Union Business Manager Rebaldo, at the conclusion of the above-described meeting presented the Company with the Union's demand for arbitration (JA5a, 35a, 50a, 75a). Subsequently, on September 24, 1973, the Union served its request for arbitration upon the Company by registered mail (JA5a, 35a, 50a, 75a). In its request for arbitration, the Union seeks a determination as to whether the Company's unilateral decision to subcontract out bargaining unit work violates the provisions of its collective bargaining agreement (JA9a-23a) to wit: Articles I (recognition clause), II (covenant of non-interference); VII (holiday clause); IX (discharge clause); XVI (layoff clause); XXI (insurance fund clause); XXII (sick leave clause); XXIII (wage clause); XXIV (vacation clause); XXVII (transfer clause); XXIX (pension clause); and XXX (duration clause).

On September 28, 1973, the Company received notice from the American Arbitration Association of the Union's request for arbitration of the previously described issues (JA 75a).

The Company has resisted proceeding to arbitration with respect to "any issue based on or arising out of Article XXVIII, contending that said Article is void and unenforceable under Section 8(e) of the . . . Act, . . . insofar as it restricts [its] right to subcontract to only those establishments under contract with [the Union]," (JA 75a).

Article XXVIII reads as follows (JA 19a):

> "It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon the signing of this Agreement all said work shall be sent to Union Establishments."

SUMMARY OF ARGUMENT

The Court below erred in striking Article XXVIII from the parties' collective bargaining agreement. Having found there was an agreement to arbitrate coupled with an arbitrable dispute, the Court below should merely have directed the parties to submit to arbitration of the grievances and disputes set forth in the Union's demand to arbitrate. However, the Court below erred when it went further and considered the validity of Article XXVIII, thereby usurping the function of the arbitrator whom the parties intended to resolve "any and all grievances and disputes".

Assuming arguendo that the Court below did not err in determining the validity of Article XXVIII, the Court was correct in excising the subcontracting clause in its entirety. To the contrary, the Appellant would have the Court excise only that portion of Article XXVIII which it contends is void and unenforceable pursuant to Section 8(e) of the Act.

To adopt the Appellant's view and excise, only a portion of Article XXVIII would unquestionably distort the intent and understanding of the parties. In this connection such a deletion as proposed by the Appellant would not leave the agreement in a state anywhere near close to the actual agreement of the parties.

Further, the inherent weakness of the Appellant's argument to delete only a portion of the clause is exemplified by the fact the Appellant submitted alternate proposals to the Court for revision of Article XXVIII. Thus, it is apparent that the Appellant is confused with respect to its own position as to manner of preserving only a portion of a single sentence which was never meant or intended to be fragmented by the parties.

ARGUMENT

POINT I

THE COURT EXCEEDED ITS JURISDICTION AND INFRINGED ON AN AREA EXCLUSIVELY RESERVED TO THE ARBITRATOR IN STRIKING ARTICLE XXVIII FROM THE COLLECTIVE BARGAINING AGREEMENT

From the inception of the parties' collective bargaining relationship in 1954, successive collective bargaining agreements have contained the following provision relating to subcontracting (Article XXVIII):

> It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to Union establishments." (JA 19a, 74a).

Article VIII of the parties' agreement is a broad and all encompassing clause providing for the submission of "any and all grievances or disputes. . . to an arbitrator to be selected by the American Arbitration Association whose decision in the matter shall be final and binding upon both parties. . . ." Thus, it is beyond argument that all of the issues relating to whether the Company violated its contract with the Union by virtue of its unilateral decision to subcontract out bargaining unit work fall within the scope of the arbitration provision.

At least since the Steelworkers trilogy was decided by the United States Supreme Court in 1960 (United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564; United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593), it has been settled that it is for the arbitrator, not the Court to resolve disputes arising under a collective bargaining agreement.

Upon considering Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a) United States Supreme Court Justice William Douglas in United Steelworkers v. American Manufacturing Co., 363 U.S. 564 held:

> "The function of the court is very limited when parties have agreed to submit all questions of interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."

Justice Douglas further stated:

> "The Court therefore has no business weighing the merits of the grievance. . . ."

Given the facts of the instant situation, it is respectfully submitted that Judge Mishler, upon finding that there was an agreement to arbitrate coupled with an arbitrable dispute, properly directed the parties ". . . to submit to arbitration, the grievances and disputes set forth in the [Union's demand to arbitrate]." However, the Court below erred when it went further and considered the validity of Article XXVIII (the subcontracting clause). The Court thus passed on an aspect of the merits of the dispute and usurped the function of an arbitrator, when the instant collective bargaining agreement provides that it is an arbitrator who shall decide all disputes arising between the parties.

The Appellant mistakenly relies on such cases as Smith v. Evening News Ass'n., 371 U.S. 195; Todd Shipyards Corporation v. Industrial Union of Marine and Shipbuilding Workers of America, Local 39 AFL-CIO, 232 F. Supp 589 (E.D. N.Y., 1964), aff'd. 344 F. 2d 107 (12d Cir. 1965); El Paso Building & Construction Trades Council v. El Paso Chapter Associated General Contractors of America, 376 F 2d 797 (5th Cir. 1967); and Paramount Bag Mfg. Co. v. Rubberized Novelty and Plastics Fabric Workers' Union, Local 98,I.L.G.W.U., 353 F. Supp. 1131 (E.D.N.Y. 1973) as authority, that in a §301

suit the District Court has jurisdiction to and must determine the legality of contractual clauses notwithstanding that such issues may also involve aspects of the Labor-Management Relations Act.

In Smith v. Evening News, supra, the Supreme Court held that where a proceeding is brought pursuant to Section 301 of the Labor-Management Relations Act, the courts have jurisdiction to enforce a collective bargaining agreement even though the suit is predicated on an action which may constitute an unfair labor practice under the National Labor Relations Act. Thus the Court had concurrent jurisdiction to enforce the agreement. There the question of arbitration as the method of enforcement was not involved.

Todd Shipyards Corporation, supra, and El Paso Building & Construction Trades Council, supra, reiterated the basic principle of Smith v. Evening News, supra. In Todd Shipyards, supra, the court found that the parties were bound by a collective bargaining agreement which contained an arbitration clause and that although the subject of the dispute involved charges which might constitute an unfair labor practice the matter must be submitted to arbitration under Section 301. Peripherally, the court noted that the subcontracting clause involved was not clearly invalid.

In the later case of Paramount Bag Mfg. Co., 353 F. Supp. 1131 (E.D.N.Y. 1973), the position of the court was further delineated. Judge Neaher in holding that access to arbitration was an additional concurrent forum stated:

> "The Court's duty is clear! Once it 'finds that, as here, the parties are subject to an agreement to arbitrate and that agreement extends to "any difference" between them' Operating Engineers v. Flair Builders, 406 U.S. 487, it must remit the parties to arbitration. It is not for the court to determine [w]hether the moving party is right or wrong."

Judge Neaher observed that Carey v. General Electric Company, 315 F 2d. 499 (2d Cir. 1963) ". . . teaches that the court should not divert the parties from arbitration because of 'fear of possible conflict' with the National Labor Relations Board's jurisdiction". The Court further pointed out that in Carey v. General Electric, supra, this Court directed arbitration of certain grievances, notwithstanding that an arbitration award might compel the commission of an unfair labor practice, on the premise that the court cannot assume "that the arbitrator [will be] ignorant or oblivious of the pronouncements of the [National Labor Relations] Board and the courts".

The Court, in Paramount Bag Mfg. Co., supra,

concluded that the factual circumstances surrounding the alleged illegality of the hot cargo clause was "properly grist for the arbitration mill". Judge Neaher concluded that it might be most appropriate however for the Court to review the legality of an alleged hot cargo clause in the context of a proceeding to confirm an arbitration award. The Court here, by its actions, made any resort to arbitration futile. For by striking the subcontracting clause there was little left for the arbitrator to consider.

In a situation such as the instant one, where the parties have specifically agreed to submit "any and all grievances and disputes" to binding arbitration, it is urged that there must be a deferral to the arbitral process. Thus, the Court upon finding an agreement to arbitrate coupled with an arbitrable dispute, should defer from reaching the merits of the dispute. United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564; United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574; United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593.

POINT II

THE APPELLANT IMPROPERLY ATTEMPTED ON APPEAL TO CHANGE AND EMASCULATE THE SUBCONTRACTING CLAUSE AGREED UPON AND TO THEN SUBMIT ITS REVISED CLAUSE TO ARBITRATION.

In the instant situation, the Appellant, seeking to employ Section 8(e) of the National Labor Relations Act to its own advantage, would have the Court fragment and otherwise distort Article XXVIII, which reads as follows:

> "It is agreed by and between the Parties that whereas the Employer send [sic] work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to Union establishments." (JA19a, 74a).

The Appellant suggests that the Court excise that portion of Article XXVIII which it contends is illegal. Specifically, the Appellant would have the Court excise that portion of Article XXVIII which provides, "...therefore, upon signing of this Agreement all said work shall be sent to Union establishments".

To adopt the Appellant's view and excise the above quoted portion of Article XXVIII would unquestionably

distort the intent and understanding of the parties. Clearly, the parties did not intend that the Company should have the unfettered right to subcontract out bargaining unit work. Rather, it is apparent that the parties agreed through negotiation that the Company might subcontract out bargaining unit work to other establishments provided said establishments were union establishments. To leave out the proviso obviously changes the meaning of the clause and is thus unseverable from it.

As a matter of general contract law, where an agreement is illegal in part only, the part which is lawful may be enforced, provided it can be separated from that part which is bad. "Enforcement of that part of a contract which is legal,...depends upon whether it is severable or 'divisible' from that part which is illegal." Simpson on Contracts, Hornbook Series, page 632. "If the agreement is bilateral and the promise on either side is unlawful, both promises are unenforceable, for one promise is itself unlawful and the other is given for unlawful consideration." Williston on Contracts, Third Edition, Section 1762.

In those cases which the National Labor Relations Board has found that a provision of a collective bargaining

agreement violated Section 8(e) of the Act, the Board, after exercising its expertise in this complicated area of the law, ordered the contracting parties to cease giving effect to those contractual provisions to the extent that they contravened Section 8(e). The Board has not and could not excise a clause thereform which would change the meaning of the provision.

In those cases cited by the Appellant relating to partially valid subcontracting provisions such as Truck Drivers Union Local No. 413 v. NLRB, 334 F. 2d 539 (D.C. Cir. 1964), cert den., 379 U.S. 916 (1964) and Meat and Highway Drivers, Dockmen, Helpers and Miscellaneous Truck Terminal Employees, Local Union No. 710, IBT v. NLRB, 335 F 2d, 709 (D.C. Cir. 1964) reviewing courts determined that it is appropriate to delete that portion of a clause that is objectionable provided the deletion, "...would leave the total collective bargaining agreement in a state close to the actual agreement of the parties", Ibid 335 F 2d, at 717. Unlike the instant matter, in each of the cases referred to by the Appellant, the disputed subcontracting provision contained a series of severable clauses.

The inherent weakness of the Appellant's argument (page 47 of its brief on appeal) with respect to Article

XXVIII is exemplified by its proposal that, "...this Court should declare that [said] Article...is valid and enforceable if revised so as to read":

> (1) "It is agreed by and between the Parties that whereas the Employer sends work out to be done in different establishments under different managements, therefore, upon signing of this Agreement all said work shall be sent to such establishments."
>
> or
>
> (2) "It is agreed by and between the Parties that [whereas] the Employer sends work out to be done in different establishments under different managements."

In essence the Appellant is unable to come forward with a method of holding together a fragment of a provision which it recognizes was never intended to and cannot stand alone. Contrary to recognized principles of collective bargaining and the provisions of Section 8(d) of the National Labor Relations Act, the Appellant would have this Court intercede and rewrite the parties' collective bargaining agreement.

The submission of a revised subcontracting provision as proposed by the Appellant would, leave an arbitrator with no alternative but to render a decision in favor of the Appellant.

On examining Article XXVIII, there can be no doubt that a partial deletion, as proposed by the Appellant, from

this provision would not leave the collective bargaining agreement in a state close to the actual agreement of the parties. As pointed out by the Supreme Court in Fibreboard Paper Products Corp., 379 U.S. 203, the subcontracting out of bargaining unit work constitutes a mandatory subject for collective bargaining. Thus, it is clear that as a result of collective bargaining, the Company obtained from the Union a limited right to subcontract out bargaining unit work in return for which the Company specifically agreed to send such work to "union establishments".

To delete the limiting language from the Company's negotiated right to subcontract out bargaining unit work (Article XXVIII) would not leave the parties close to their actual agreement. To the contrary, should the Court adopt the Appellant's proposal to revise Article XXVIII, the Appellant would gain the position of having an unfettered right to subcontract out bargaining unit work, a position which the parties never intended nor even agreed upon.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court below should be modified and revised to the extent the Court below found Article XXVIII to be unenforceable and void. Alternatively, this Court should affirm the decision of the Court below in its entirety.

Dated: New York, N.Y.
April 5, 1974.

Respectfully submitted,

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